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ISLAMIC FINANCIAL SERVICES BOARD

v.

MARLIN FAIROL MOHD FAROQUE & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[APPLICATION FOR JUDICIAL REVIEW NO: R3(2)-25-196-2008]
8 FEBRUARY 2010

C

LABOUR LAW: *Industrial Court - Jurisdiction, challenges to - Employee employed by Islamic Financial Services Board - Dismissal of employee - Whether employer a statutory body with immunity from legal process - Whether Industrial Court seised of jurisdiction to adjudicate claim against dismissal - Point at which challenge as to jurisdiction ought to be taken -*

D

Whether court must hear merits of suit before adjudicating on jurisdiction - Industrial Relations Act 1967 s. 20(3), s. 52 - Islamic Financial Services Board Act 2002 s. 7

LABOUR LAW: *Industrial Relations Act 1967 - Application - Provisions*

E

of Act not applicable to statutory authorities - Whether international organisations established under international agreement statutory authorities - Industrial Relations Act 1967 s. 52

WORDS AND PHRASES: *Definition of 'statutory authority' - Whether*

F

limited to public bodies which are incorporated under statute to perform public functions - Whether includes international organisations established under international agreement - Industrial Relations Act 1967 s. 52

WORDS AND PHRASES: *Definition of 'other legal process' - Whether*

G

includes proceedings in Industrial Courts - Islamic Financial Services Board Act 2002 para. 1 of Part I of Schedule

The Islamic Financial Services Board ("IFSB") (the applicant), applied for an order of *certiorari* under O. 53 Rules of the High Court 1980 to quash the entire award of the Industrial Court. The

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respondent/claimant was employed by the appellant with effect from 2 June 2003. She was subsequently dismissed on 28 May 2004 on the ground of unsatisfactory performance. The matter was referred to the Industrial Court under s. 20(3) of the Industrial Relations Act ("IR Act"). The Industrial Court found in favour of the respondent

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and awarded her compensation *in lieu* of reinstatement and backwages. The main issue arising was in relation to the jurisdiction

of the court to hear the matter on the grounds that the appellant was an international organisation invested with privileges and immunities under s. 7 of the Islamic Financial Services Board Act 2002 ("the IFSB Act"), reg. 2 of the Islamic Financial Services Board Regulations ("IFSB Regulations") and the schedule to the IFSB Act. The appellant elected not to produce any evidence and relied entirely on the general immunities and privileges under the IFSB Act and regulations. The appellant also relied on s. 52 of the IR Act to deny threshold jurisdiction to the Industrial Court on the ground that by definition, the appellant fell within the category of "statutory body". The Industrial Court found that the appellant could not be regarded as a statutory authority because it was not established by a written law but was established by an agreement entered into between its founding members.

Held (allowing the application for judicial review for an order of *certiorari* to quash the award of the Industrial Court with no order as to costs):

(1) An issue on jurisdiction, namely immunity from suit or from legal process, is a question of law which properly speaking should be taken at the outset and without needing to hear the merits of any particular application or suit; *Kathiravelu v. Kojasa Holdings Sdn Bhd* (dist). (para 16)

(2) A proper interpretation of s. 52(1) will be that "statutory authority" should be limited to public bodies which are incorporated under statute to perform public functions or provide public services as part of the overall functions of Government. It would be stretching the definition of "statutory authority" to include even international organisations which were first and foremost established under International Agreement. However, it was not proper to adopt a purely mechanistic approach to s. 52(1) of the IR Act whilst ignoring the statutory context and purpose of the IFSB Act. That immunity accorded to the appellant was clearly stated in the IFSB Act. The IFSB Act was intended to confer privileges and immunities on the appellant so that the body could function properly as an International Body. Viewed from the perspective of the international obligations assumed by Malaysia as the host country, it was necessary to maintain the

A independence and international character of IFSB for the body to be vested with not only juridical personality but also necessary privileges and immunities from suit and from legal process. (paras 23 & 24)

B **(3)** On a plain reading of para. 1 of part I of the schedule, immunity from "other legal process" should be given its ordinary meaning. It will be stretching logic and consistency to limit "other legal process" to proceedings in a court of law. (para 39)

C **(4)** Considering the international obligations of Malaysia and the specific statutory provisions, the Industrial Court Chairman had failed to properly direct himself on the law, and as such had occasioned an error of law which needed correction by the court in exercise of its judicial review jurisdiction. (para 49)

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Case(s) referred to:

Anthony Voon Fook Nyen v. Worldfish Center [2008] 4 ILR 99 ***(refd)***

Asia-Pacific Institute For Broadcasting Development v. Indra Bala Anthony [1999] 3 ILR 429 ***(refd)***

E *Bertolucci v. European Bank for Reconstruction and Development and Others [EA T/276/97]* ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***

Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 3 CLJ 541 FC ***(refd)***

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v.
F *Dikim Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 FC* ***(refd)***

Kathiravelu Ganesan & Anor v. Kojasa Holdings Sdn Bhd [1997] 3 CLJ 777 SC ***(dist)***

Marlin Fairol Mohd Faroque v. Islamic Financial Services Board [2008] 2 ILR 664 ***(refd)***

G *Mukoro v. European Bank for Reconstruction and Development and Another [1994] ICR 897* ***(refd)***

Nasioncom Holdings Bhd v. Suruhanjaya Sekuriti [2008] 7 CLJ 355 HC ***(refd)***

R(H) v. Ashworth Hospital Authority [2003] 1 WLR 127 ***(refd)***

Regional Centre for Arbitration v. Ooi Beng Choo [1994] 2 ILR 1304 ***(refd)***

H *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal [1998] 3 CLJ 85 CA* ***(refd)***

Waite and Kennedy v. Germany (Application No 26083/94) ***(refd)***

YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor [2003] 1 CLJ 210 HC ***(refd)***

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Legislation referred to:
Industrial Relations Act 1967, ss. 2, 20(3), 52(1)
Interpretation Acts 1948 and 1967, s. 17A
Islamic Financial Services Board Act 2002, ss. 1(2), 2, 3(1), (2), 7(1), 8
Islamic Financial Services Board (Privileges and Immunities) Regulations 2002, reg. 2
Rules of the High Court 1980, O. 53 r. 3(5)

European Convention on Human Rights, art. 1

For the appellant - Lim Heng Seng (Dato' T Thavalingam & Dymphna Lanjuran with him); M/s Zaid Ibrahim & Co
For the 1st respondent - Suria Kumar DJ Paul; M/s Suria Kumar & Co

Reported by Amutha Suppayah

JUDGMENT

Mohamad Ariff Yusof J:

Introduction

[1] In this judicial review application under O. 53, the Islamic Financial Services Board ("IFSB"), the applicant, applied for an order of *certiorari* to quash the entire award (*Marlin Fairol Mohd Faroque v. Islamic Financial Services Board* [2008] 2 ILR 664 (Award Number 867 of 2008) of the Industrial Court, and for an order to stay all proceedings to enforce this award until the final disposal of the substantive application. I granted leave to the applicant and, after hearing extended argument, agreed with applicant's counsel that this was a proper case to grant a stay of proceedings pending the disposal of the substantive application for *certiorari*. In granting the stay, I provided my reasons which in summary concluded that there were special circumstances on the facts of this application to warrant the grant of stay of proceedings.

The Stay Application

[2] The starting point has to be the very terms of O. 53 r. 3(5) itself, which is worded as follows:

A The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

[3] This provision has been meticulously analysed by her ladyship Lau Bee Lan J in *Nasioncom Holdings Bhd v. Suruhanjaya Sekuriti* [2008] 7 CLJ 355, where the wording was held to have a B wide application which extended beyond judicial proceedings, but involved an exercise of proper discretion, and in considering this proper discretion to grant stay, the court would need to consider whether there were special circumstances.

C **[4]** I indicated in my decision that "stay of proceedings" in the context of judicial review has a special connotation, and, although there could be overlaps in standards applied, judicial review stay is not the same as stay of execution after judgment in judicial proceedings. The wide import of judicial review stay has been D recognized as well in *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Jaafar v. Datuk Bandar Kuala Lumpur & Anor* [2003] 1 CLJ 210:

> The phrase "a stay of proceedings" must have a wider E application. It does not confine to proceedings in court only. Today, many applications for judicial review are for orders of *certiorari* to quash decisions of decision making bodies other than courts, including Government Ministers, local authorities and other bodies whose decisions are susceptible to judicial review. Thus the phrase "a stay of proceedings" in relation to such bodies must F mean "a stay of the process by which the decision challenged has been reached, including the decision itself."

[5] See also *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85, where the G Court of Appeal explained the effect of a stay as "temporarily suspending the effect of a public law decision pending the outcome of *certiorari* or prohibition proceedings brought to challenge the validity of the particular decision."

H **[6]** Counsel for the applicant, Mr Lim Heng Seng, also drew my attention to the decision in *R(H) v. Ashworth Hospital Authority* [2003] 1 WLR 127, where the English Court of Appeal has usefully and clearly explained the purpose of stay, described by counsel as the "denial of full benefit of successful challenge" test:

I The purpose of stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the

> determination of the challenge. It preserves the *status quo*. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success … In my view it should also be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction.

[7] This preservation of the *status quo* argument is similar to the position taken in, for example, *YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor (supra)* that stay should be granted so as not to render the substantive motion for judicial review nugatory. The precise formula adopted by courts has not been consistent, but the test of "special circumstances" is a pragmatic test which, to my mind, can embrace even preservation of *status quo* or prevention of nugatory effect or prevention of the full benefits of success tests.

[8] I held, when rendering the decision on stay, thus:

> After considering the authorities, there is merit and justification in following the "special circumstances" test as propounded in *Nasioncom Holdings v. Suruhanjaya Sekuriti*, as a useful and workable test to guide the exercise of the court's discretion under Order 53, r. 3(5). Indeed, the "nugatory effect" test can be subsumed under "special circumstances", as indicated in *Kosma Palm Oil Mill Sdn Bhd v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1. Although Kosma is not an Order 53 application, there is no reason in principle why this test cannot apply to judicial review as well. Even the "denial of full benefit of successful challenge" test can be brought within this overriding principle.
>
> Matters of public policy, parliamentary intent and the international obligation of Malaysia as the host country under the ISFB Agreement are at stake here, and it will be detrimental to these if this Court were to refuse stay of proceedings and later rule in favour of IFSB on the substantive application. The detrimental effect to the 1st Respondent's interest will be slight since this Court will grant an early hearing of this matter.

[9] I now provide my decision on the substantive application.

Substance Of Application - Issue Of Jurisdiction

[10] At both stages of application for leave and the present substantive application, the main issue relates to the jurisdiction of this court to hear this matter on the argument that the IFSB is an international organisation invested with privileges and immunities

under s. 7 of the Islamic Financial Services Board Act 2002 (Act 623) ("the IFSB Act"), reg. 2 of the Islamic Financial Services Board Regulations ("IFSB Regulations") and the Schedule to the IFSB Act.

The Relevant Provisions Of The Ifsb Act And Regulations

[11] Section 7 of the IFSB Act provides, in so far as material to the facts of this application, as follows:

> (1) The Minister may by regulations, either with or without restrictions or to the extent or subject to the conditions prescribed in such regulations, confer upon the Board, the members of its constituent organs or any persons attending an international conference organised by the Board all or any privileges or immunities listed in the schedule.
>
> (2) Without prejudice to the generality of sub-s. (1), the Minister may by regulations:
>
> (a) confer upon the Board all or any of the privileges or immunities specified in part one of the schedule;
>
> ...
>
> (4) The Minister may make regulations as he deems appropriate for the purpose of the section which may be of general application or may relate to:
>
> (a) particular members or classes of members;
>
> (b) particular members or classes of members of its constituent organs; or
>
> (c) particular persons or classes of persons.

[12] The Minister, acting under this s. 7 power, has made the IFSB Regulations, in which reg. 2 states:

> The Board should have all the privileges and immunities specified in Part 1 of the Act.

[13] Part 1 of the Schedule reads:

> Privileges and Immunities of the Board.
>
> 1. Immunity of the Board, and of the property and assets of, or in the custody of, or administered by, the Board, from suit and from other legal process.

Brief Facts Of The Application

[14] The respondent here (the claimant before the Industrial Court) was employed as assistant project manager by the board with effect from 2 June 2003 under an initial probationary period which was subsequently extended, and she was eventually confirmed in her appointment. She was subsequently dismissed by a letter of termination dated 28 May 2004 on the ground of unsatisfactory performance. The Minister referred the case to the Industrial Court under s. 20(3) of the Industrial Relations Act, and the Industrial Court found in her favour, awarding a total compensation of RM206,437.50 consisting of compensation in view of reinstatement (RM8,257.50) and backwages (RM198,180). The respondent had worked with the board for approximately one year, and hence the compensation *in lieu* of reinstatement was limited to the one month's salary. The Industrial Court Chairman awarded the maximum of 24 months' backwages, without any reduction, but noted that the second schedule of the Industrial Relations (Amendment) Act 2007 restricted the award of backwages to a maximum of 24 months and that came into force on 28 February 2008, namely before the conclusion of the hearing of the reference to it in this case, which was on 9 April 2008. This amendment has recognised in statutory form what used to appear as Practice Direction No. 1 of 1987, and the principle in *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 CLJ 541. In awarding the maximum of 24 months' backwages, the Industrial Court Chairman noted that no evidence was led as to the claimant's post dismissal earnings and as a consequence no re-scaling of backwages would be ordered.

[15] Right from the outset the case for the IFSB rested on lack of jurisdiction of the Industrial Court to hear the matter in view of the provisions of the IFSB Act and the provisions mentioned earlier. Even before the hearing started, solicitors for the board had informed the Industrial Court that they would be taking a preliminary objection, but the proposed preliminary objection was retracted in view of the dictum in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Sdn Bhd* [1997] 3 CLJ 777 which presented a view that when a questioned was taken as to the threshold jurisdiction

of the Industrial Court, the Industrial Court must be permitted to decide the dispute to conclusion and deal with the jurisdictional question in the same process. The board therefore elected not to produce any evidence; its case relied entirely on the general immunities and privileges under the IFSB Act and Regulations.

[16] An issue on jurisdiction of this nature, namely immunity from suit or from legal process, is a question of law which properly speaking should be taken at the outset and without needing to hear the merits of any particular application or suit. Logically, if there is blanket immunity for any tribunal to even proceed to hear, that tribunal should decide this preliminary issue without proceeding any further on the merits. The *Kathiravelu dictum* should perhaps not be applied on the facts of a case where a preliminary objection is taken on jurisdiction based on the existence of privileges and immunities from suit or legal process. It is possible to understand this dictum when an argument is raised that the dismissed employee has been offered reinstatement and therefore a threshold jurisdiction is raised. In this event, the preliminary objection should be raised earlier at this stage of the Minister's reference. Where no challenge is made to the Minister's reference, the Industrial Court should proceed to hear the matter to its conclusion, although the threshold question could be taken by it in the course of the hearing. Unlike the issue of privileges and immunities, which is strictly a question of law, the threshold jurisdiction issue in relation to whether or not reinstatement has been offered earlier, is invariably a question of mixed fact and law. Thus there may be good reasons to allow the Industrial Court to proceed with the hearing and decide the issue of jurisdiction in at the conclusion of the hearing.

The Industrial Court's Response To The Issue Of Immunities And Privileges Of The Board

[17] The Industrial Court formulated the issues before it in the following manner:

(i) The operation of s. 52 of the Act (in this case the Industrial Relations Act);

(ii) The immunity of the Board under s. 7 and Part 1 of the Schedule of the IFSB Act;

(iii) In the event the board could not rely on both or either of the two provisions above, whether the dismissal of the

claimant was with just cause or excuse.

Operation Of Section 52 Of The Industrial Relations Act

[18] This issue appears to have been uppermost in the consideration of the Industrial Court Chairman. IFSB raised s. 52 of the Industrial Relations Act as one of the arguments marshalled by it to deny threshold jurisdiction to the Industrial Court. This argument is premised on the ground that by definition IFSB falls within the category of "statutory body", as that term is used in s. 52. Section 52(1) of the Industrial Relations Act reads:

> (1) Parts II, III, IV, V and VI shall not apply to any government service or to any service of any statutory authority on to any workman employed by the government or by any statutory authority.

[19] As can be seen from this wording, the application of the Industrial Relations Act and therefore the jurisdiction of the Industrial Court do not extend to any workman employed by any "statutory authority".

[20] Section 2 of the Industrial Relations Act defines "statutory authority" as meaning "an authority or body established, appointed constituted by any written law, and includes any local authority."

[21] The Industrial Court Chairman found, on the facts of the claim, that the IFSB could not be regarded as a statutory authority as defined, because it was not established, appointed or constituted by a written law. On the contrary, IFSB was established by an agreement entered into between its founding members who were the respective National Regulators and Supervisors of Financial Services based on Islamic Principles. The Governor of Bank Negara Malaysia was one of the signatories, the rest being the Governor of the Bahrain Monetary Agency, Governor of the Bank Indonesia, the Governor of Bank Markazi Jomjouri Iran, the Governor Of the Central Bank of Kuwait, the Governor of the State Bank of Pakistan, the Governor of the Saudi Arabian Monetary Agency, the Deputy Governor of the Bank of Sudan and the President of the Islamic Development Bank.

[22] The Industrial Court stated "it is obvious that the board is a creature of an agreement and not the IFSB Act." The learned Industrial Court Chairman found assistance for this conclusion in

s. 2 of the IFSB Act as well as its preamble. Section 2 of the IFSB Act, for example, defines "board" as meaning "the Islamic Financial Services Board established by the agreement." The preamble further refers to the IFSB Act as "an Act to enable bank Negara Malaysia to become a member of the Islamic Financial Services Board by signing and accepting the agreement establishing the board and to confer certain powers, immunities and privileges upon the board and its consequent organs and for matters connected to it."

[23] As a matter of strict statutory interpretation of s. 52(1) of the Industrial Relations Act read together with s. 2 and the preamble to the IFSB Act, this conclusion is most probably correct, particularly if s. 17A of the Interpretation Act is considered. Giving the various sections their statutory purposes, particularly reading s. 52(1) contextually, the term "statutory authority" is placed in the context of Government Service and service in any local authority. A proper interpretation of s. 52(1) will therefore be that "statutory authority" should be limited to public bodies which are incorporated under statute to perform public functions or provide public services as part of the overall functions of Government. In my mind, it will be stretching the definition of "statutory authority" to include even international organisations which are first and foremost established under International Agreement. Such international organisations are thereafter invested with specific statutory powers, privileges or immunities under domestic law, such is the case here as regards IFSB, but this conferment should not convert what is essentially an international organisation into a statutory authority, as that term is understood under s. 52(1). To this extent, I would regard the conclusion of the learned Industrial Court Chairman as correct, subject to what I shall elaborate subsequently in these grounds on the more general issues of the status, privileges and immunities of international organisations both in the domains of international law as well as domestic law.

[24] In this connection, it is critical to examine and appreciate the purpose and content of the agreement establishing the IFSB as well as to interpret and construe - and to do so contextually- the relevant provisions in the IFSB Act against the relevant provisions in the Industrial Relations Act. I do not believe it is proper to

formulate the legal solution to the problem at hand by adopting a purely mechanistic approach to s. 52(1) of the Industrial Relations Act whilst ignoring the statutory context and purpose of the IFSB Act.

[25] It has to be stressed there are two domains to this question - one, the domain of public international law, and second, the domain of domestic law. It is not in dispute that the IFSB is an international organisation established by agreement between the parties I have mentioned earlier, including Bank Negara Malaysia.

The Articles Of Agreement Of The Islamic Financial Services Board

[26] The articles of agreement was signed on 3 November 2002 with the following preamble:

> Whereas
>
> A. By the grace of Allah, there has been a worldwide increase in demand for financial services based on Islamic principles.
>
> B. There is a need for internationally recognised unified standards for fostering effective regulation and supervision of such services.
>
> C. The signatories to this agreement (the "founding members"), being national regulators and/or supervisors and/or other interested parties have come together with the intention of establishing a body to issue such standards.
>
> D. The founding members wish hereby to establish the Board for coordinating and giving guidance on good practices in the regulation and supervision of Islamic Financial Services and hereby set out the rules which govern the body.

[27] Chapter 1 of the articles of agreement specify:

> Article 1
>
> The body is hereby established and shall be known as the "Islamic Financial Services Board" (hereinafter, the "IFSB").
>
> Article 2
>
> The IFSB shall have separate legal personality.

A Article 3

The IFSB shall be established and located in Kuala Lumpur, Malaysia which shall host the secretariat.

[28] The host country of the secretariat shall ensure that the
B IFSB and its consequent organs (as set out in art. 5) shall be exempted from all taxes, duties, and levies, and shall be granted other immunities and privileges in respect of the assets, properties, incomes and operations. Article 3 very clearly imposes obligations as a matter of treaty law on the host country, which in this case
C is Malaysia.

[29] To appreciate the international role of the IFSB and the functions of the host country, Malaysia, it is important to appreciate the objectives of the IFSB as spelt out in its objectives
D detailed in art. 4, which reads:

The objectives of the IFSB are:

(a) to promote the development of a prudent and transparent Islamic Financial Services Industry through introducing new,
E or adapting existing, international standards consistent with Shariah principles, and recommend these for adoption.

(b) to provide guidance on effective supervision and regulation of institutions offering Islamic Financial Products and to develop for the Islamic Financial Services Industry the criteria for
F identifying, measuring, managing and disclosing risks, taking into account international standards of valuation, income and expense calculation, and disclosure.

(c) To liaise and co-operate with relevant organisations currently setting standards for the stability and the soundness of the
G International Monetary and Financial Systems and those of the member countries.

(d) To enhance and coordinate initiatives to develop instruments and procedures for efficient operations and risk management.

H (e) To encourage co-operation amongst member countries in developing the Islamic Financial Services Industry.

(f) To facilitate training and personnel development in skills in areas relevant to the effective Regulation of Islamic Financial
I Services Industry and related markets.

(g) To undertake research into, and publish studies and surveys on, the Islamic Financial Services Industry.

(h) To establish a database of Islamic Banks, Financial Institutions and Industry experts.

(i) Any other objectives which the General Assembly of the IFSB may agree from time to time.

The Islamic Financial Services Board Act 2002

[30] I have earlier quoted the preamble to the IFSB Act, and highlighted the purpose of the Act as enabling Bank Negara Malaysia to become a member of the Islamic Financial Services Board by signing and accepting the agreement establishing the Board and to confer certain powers, immunities and privileges upon the board and its constituent organs and for matters connected. By s. 1(2), the IFSB Act is stated as coming into operation on the date the agreement comes into effect, being the date when at least five of the full members of the board had ascribed their signatures to the agreement. There are then two main parts to the IFSB act as can be seen from the preamble, namely (1) as an enabling act to enable bank Negara Malaysia to become a member of the board by signing and accepting the agreement, and (2) as an Act to confer powers, immunities and privileges upon the board and its constituent organs. With the second purpose in mind, s. 3 sub-s. (1) provides that the board shall have juridical personality and such legal capacity is as a necessary for the exercise of powers and functions under the agreement. Section 3(2) further provides that without prejudice to the generality of sub-s. (1), the board shall have the capacity to contract, acquire, hold and dispose of movable and immovable property, and to institute legal proceedings. As has been also stressed earlier, s. 7(1) then provides that the Minister may by regulations, either with or without restrictions on to the extent or subject to the conditions prescribed in such regulations, confer upon the board, the members of its constituent organs or any person attending an international conference organised by the board any of privileges or immunities listed in the Schedule. By virtue of s. 7 the IFSB Regulations are made (the Islamic Financial Services Board (Privileges and Immunities) Regulations 2002) and regulation to expressly provide that the board shall have all the privileges and

immunities specified in Part 1 of the Schedule to the Act. Paragraph 1 of Part 1, as seen above, expressly provides for the immunity of the Board, *inter alia,* "from suit and from other legal process".

The Legislative Background

[31] That immunity is to be accorded to the IFSB is clearly stated in the IFSB Act. The issue is whether this clear provision can be taken as intended as having the fact of ousting the jurisdiction of the Industrial Court under the Industrial Relations Act from hearing a complaint brought by its employee against it for unlawful dismissal. In this connection, much will depend on the meanings to be ascribed to the terms "suit" and "other legal process". In short, the question to ask is whether proceedings before the Industrial Court under the Industrial Relations Act can be deemed to be either a "suit" or "other legal process" within the meaning of Part 1 of the Schedule to the IFSB Act. The answer to the question will necessarily involve a consideration of the legislative background as an aid to interpretation of these terms.

[32] The legislative background of an Act is a permissible aid to interpretation. See *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285 and *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57.

[33] Counsel for the applicant has in the course of submission appropriately referred to the speech by the Deputy Minister of Finance, as reported in the Hansard, during the first reading of the Bill, as well as the second and third readings. The Minister said in a speech:

> Rang undang-undang ini juga akan memberikan keperibadian juristical serta membolehkan Menteri Kewangan dengan persetujuan Menteri Luar Negeri memberi kekebalan dan keistimewaan yang perlu agar badan ini dapat menjalankan tugasnya dengan sempurna ...

[34] This is a clear statement to Parliament that the IFSB Act is also intended to confer privileges and immunities on the IFSB so that the body can function properly as an International Body. Such requirement was persuasively explained in the English

Employment Appeals Tribunal decision of *Bertolucci v. European Bank for Reconstruction and Development and Others* [EA T/276/97]: A

> An international organisation ..., whether incorporated not, is merely the means by which a collective enterprise of the member states is carried on, and through which their relations with each other in a particular sphere of common interests are regulated. Any attempt by one of the member states to assume responsibility for the administration ... of the organisation would be inconsistent with the arrangements made by them as to the manner in which the enterprise is to be carried on and the relations with each other in that sphere regulated. Sovereign states are free, if they wish, to carry on a collective enterprise through the medium of an ordinary commercial company incorporated in the territory of one of the members. But if they chose instead to carry on through the medium of an international organisation, no one member state, by executive legislative or judicial action can assume the management of the enterprise is and subjected to its own domestic law. For if one could, then all could; and the independence and international character of the organisation would be fragmented and destroyed (per Millet J). B C D

[35] Viewed from the perspective of the international obligations assumed by Malaysia as the host country, it is necessary to maintain the independence and international character of IFSB for the body to be vested with not only juridical personality but also necessary privileges and immunities from suit and from legal process. In this respect, I agree with the position taken by counsel for the applicant who has correctly referred to the available persuasive case law on immunities granted to international organisations, namely the cases of *Mukoro v. European Bank for Reconstruction and Development and Another* [1994] ICR 897 and *Bertolucci v. European Bank for Reconstruction and Development and Others*. E F G

[36] In *Mukoro*, the English Employment Appeal Tribunal said:

> As immunity from suit and legal process conferred on foreign states, diplomats, international organisations and their officials may produce severe disabilities for individuals in respect of fundamental rights, it can only be justified on overriding public policy or interest. In the case of an international organisation, such as the bank, immunity from suit and legal process may be justified on the ground that it is necessary for the fulfilment of the purposes of the bank, for the preservation of its independence and neutrality from control by interference from the host state and for the H I

A effective and uninterrupted exercise of its multinational functions through its representatives.

[37] A similar approach has been adopted by our Industrial Court in *Anthony Voon Fook Nyen v. Worldfish Center* [2008] 4 ILR 99, and I am of the considered view that this is the correct approach to take as opposed to two earlier decisions of the Industrial Court in *Regional Centre for Arbitration v. Ooi Beng Choo* [1994] 2 ILR 1304 and *Asia-Pacific Institute For Broadcasting Development v. Indra Bala Anthony* [1999] 3 ILR 429.

[38] In the *Worldfish Centre* case, the learned chairman of the Industrial Court correctly stated:

> The contention by the Claimant's learned counsel that the Court should follow the Federal Constitution regarding the right to livelihood rather than the said Agreement with ICLARM is without strong merits. The Government of Malaysia as a responsible member of the international community especially in this age of globalization is expected to fulfil its obligations embodied in the said Agreement signed in Kuala Lumpur ... The benefits derived from this Agreement are mutual and are beneficial to the country.

[39] Whilst the international obligations of the Malaysian Government are clearly spelt out in the articles of agreement here, it remains to be considered whether the immunities and privileges conferred by the IFSB Act extend to immunity from suit and process, to include immunity from Industrial Court proceedings, which is a matter of domestic law. This involves a matter of statutory interpretation. On a plain reading of para. 1 of Part I of the Schedule, immunity from "other legal process" should be given its ordinary meaning. It will be stretching logic and consistency to limit "other legal process" to proceedings in a court of law. That is sufficiently covered by the reference to "suit".

[40] What else can proceedings before the Industrial Court be except a form of "legal process"?

[41] Any number of dictionary definitions can be quoted here in support of a plain and logical meaning of the term "legal process".

[42] *Black's Law Dictionary* (6th edn):

> The term is sometimes used as equivalent to "lawful process".

> Thus, it is said that legal process means process not merely fair on its face, but in fact valid. But properly it means a summons, writ, warrant, mandate or other process issuing from a court.

[43] *Burton's Legal Thesaurus* (4th edn):

> summons, summons for a case, summons for a cause in court, summons for a controversy before a court, summons for a legal action, summons for a legal contest, summons for a legal controversy, summons for a legal dispute, summons for a trial, summons for an action at law, summons for legal proceedings, summons for litigation, summons for suit at law, writ.
>
> Associated Concepts: means to compel appearance.

[44] It can be observed the above definitions are couched in very wide terms, to include of course proceedings in a proper court of law, but they do not exclude other forms of lawful process.

[45] Indeed, it will be pertinent to note that the IFSB Act itself specifies the exact areas where there this immunity and privilege does not exist. This can be found expressed in s. 8, which reads:

> This Act shall not confer on any person referred to in section 7 any immunity:
>
> (a) In respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle or other means of transport belonging to or driven by such person;
>
> (b) In respect of a traffic offence involving such person and committed by such person; and
>
> (c) In respect of matters affecting the national interest of Malaysia.

[46] In the course of submission, counsel for the 1st respondent cited before this court a decision of the European Court of Human Rights in *Waite and Kennedy v. Germany* (Application No. 26083/94) which appear to indicate that the availability of reasonable alternative means to provide effective protection to the rights of staff members of an international organisation, would be a material factor in any decision to grant immunity. I feel it would

A be necessary to read this case in context, as limited to requirements under the European Convention on Human Rights affecting the High Contracting Parties *inter se* and expressly mandating them to "secure to everyone within their jurisdiction the rights and freedoms defined in s. 1 of [the] Convention."

B

[47] I do not believe the persuasive authority of *Mukoro v. European Bank for Reconstruction and Development and Another* and *Bertolucci v. European Bank for Reconstruction and Development and Others* is necessarily thereby diminished.

C

[48] Nevertheless, it will be good governance for any reputable international organisation, such as the IFSB, to seriously consider and provide the aforesaid "reasonable alternative means to provide effective protection to the rights of staff members of an international organisation" as a means of correcting the imbalance occasioned by the grant of immunity.

D

Conclusion

[49] In the circumstances and considering the international obligations of Malaysia and the specific statutory provisions referred to earlier, I am of the view that the Industrial Court Chairman has failed to properly direct himself on the law, and as such has occasioned an error of law which needs correction by this court in exercise of its judicial review jurisdiction.

E

F

[50] Application for judicial review for an order of certiorari to quash the award of the Industrial Court allowed with no order as to costs bearing in mind this is a matter of public interest to both parties.

G

H

I